

USDC SCAN INDEX SHEET



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3:98-CR-00519 USA V. BOGART

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ORIGINAL

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RECEIVED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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15 IN THE UNITED STATES DISTRICT COURT  
16  
17 SOUTHERN DISTRICT OF CALIFORNIA

18 UNITED STATES OF AMERICA, ) CR Case No. 98-0519-JM  
19 Plaintiff, ) Sentencing: 12/18/98  
20 ) 8:30 a.m.  
21 v. ) DEFENDANT CONTE'S  
22 ) MOTION FOR  
23 RUSSELL J. CONTE, ) DOWNWARD DEPARTURE  
24 Defendant. )

25 COMES NOW the DEFENDANT, RUSSELL J. CONTE (CONTE), by and  
26 through counsel undersigned, and hereby files his Motion for  
27 Downward Departure. Based on the following memorandum, CONTE  
28 requests a downward departure of at least 10 levels. WHEREFORE,  
CONTE prays for an order of this Court ordering a downward  
departure of at least 10 levels.

29 I. OVERVIEW

30 CONTE, formerly of Utah and now living in Arizona, has plead  
31 guilty to one count of wire fraud for his involvement in a  
32 fraudulent scheme in which his former Utah friend, MURDOCK, lost  
33 approximately \$2.7 million. The investment scheme was devised by  
34  
35

1 BOGART, assisted by LUCCI, both of San Diego, who have both  
2 likewise plead guilty. It is significant that CONTE was not aware  
3 of BOGART'S scheme until after MURDOCK had invested over \$1.2  
4 million with BOGART. However, during the initial \$1.2 million  
5 investment, CONTE misled MURDOCK by not informing MURDOCK that  
6 CONTE was to receive 10% of all that MURDOCK invested with BOGART.  
7 Moreover, after MURDOCK'S loss of \$2.7 million, and prior to any  
8 notice to CONTE of a criminal investigation, CONTE took steps  
9 toward making MURDOCK whole, including, inter alia, payment of  
10 restitution of \$220,000. CONTE also assigned a note to MURDOCK in  
11 the amount of \$250,000.

12 CONTE moves for downward departure on a number of grounds,  
13 including, inter alia, post-offense/pre-investigation  
14 rehabilitation/remorse/super acceptance of responsibility. In the  
15 very recent case of U.S. v. Green, 152 F.3d 1202, 1206-08 (9th Cir.  
16 1998) the court affirmed a post sentence rehabilitation downward  
17 departure and recognizes, at 1206, "no difference between post-  
18 offense rehabilitation and post-sentencing rehabilitation." Thus,  
19 the Ninth Circuit has made clear that district courts have the  
20 discretion to grant downward departures based upon post-offense  
21 rehabilitation.

22 CONTE also requests downward departure on grounds of  
23 diminished capacity: he was diagnosed as bi-polar circa 1991, well  
24 before the offense date of 1993. Since the 1991 diagnosis, CONTE  
25 has been treated for his bi-polar condition with various  
26 medications and even with electric shock treatment. His bi-polar

1 condition is incurable. DR. GUERNSEY, a psychiatrist who initially  
 2 diagnosed CONTE, will testify at the evidentiary hearing and attest  
 3 to not only his diagnosis, but the fact that in DR. GUERNSEY'S  
 4 opinion, CONTE'S mental capacity was significantly reduced and  
 5 substantially contributed to the commission of the subject offense.

6 As evidenced by the cases discussed, infra, it is clear that  
 7 diminished capacity in general, and bi-polar in particular, have  
 8 been greatly misunderstood, or to put it another way, have not been  
 9 fully appreciated in the context of downward departures. What is  
 10 now clear is that the Commission has undertaken to expand its  
 11 recognition of diminished capacity as a ground for downward  
 12 departure. In fact, the Commission amended §5K2.13, defines  
 13 "significantly reduced mental capacity" in accord with the decision  
 14 in U.S. v. McBroom, 124 F.3d 533 (3rd Cir. 1997). November 1, 1998  
 15 Amendments, Amendment No. 583. As the Commission's 1998  
 16 Application Note 1 to §5K2.13, Amendment No. 583, states:

17 The McBroom court concluded that  
 18 "significantly reduced mental capacity" included both cognitive impairments (i.e., an  
 19 inability to understand the wrongfulness of the conduct or to exercise the power of  
 20 reason) and volitional impairments (i.e., an  
inability to control behavior that the person  
knows is wrongful). The application note  
 21 specifically includes both types of  
 22 impairments in the definition of  
 23 "significantly reduced mental capacity."  
 (Emphasis added.)

24 As DR. GUERNSEY will testify, here CONTE understood the  
 25 wrongfulness of his conduct, but suffered a volitional impairment:  
 26 CONTE was unable to control behavior that CONTE knew was wrongful.  
 27 While at first blush this assertion with respect to an educated man

1 (several years of college), of high intelligence, a family man with  
2 a wife and three children, may appear incredible. A reading of  
3 McBroon and similar cases will bring to light the fact that it is  
4 not uncommon that a man of high intelligence and professional  
5 background who suffers from a bi-polar condition is unable to  
6 control his compulsions. In fact, McBroon, who suffered from a bi-  
7 polar condition, was an attorney.

8 That CONTE'S doctors prescribed electric shock treatment and  
9 that CONTE willingly underwent such treatment attests to the  
10 seriousness of CONTE'S condition, and attests to the fact that  
11 CONTE has not "made much ado about nothing." Query: Who in their  
12 right mind would agree to electric shock treatment, unless they  
13 trusted their doctor's diagnosis and prognosis? Here the doctors  
14 determined that the patient is bi-polar and electric shock  
15 treatment will assist the patient, especially given that prescribed  
16 medications have failed to obtain favorable results.

17 It is significant to note that all of CONTE'S legal problems  
18 arose after his bi-polar disorder and about the same time: (1) the  
19 Utah state forgery case, 1991 (vacated); (2) the Utah false SSN/tax  
20 federal case, 1991; (3) the subject case, 1992. Thus, the causal  
21 relationship is linked in time.

22 That post-Koon the Ninth Circuit gives wide latitude to the  
23 district court in making a downward departure determination is best  
24 evidenced by the very recent case of U.S. v. Sanchez-Rodriguez,  
25 F.3d \_\_\_ 1998 W.L. 81 855 (9th Cir. 1998) (en banc). In Sanchez-  
26 Rodriguez, decided November 20, 1998, the district court departed

1 from a range of 77-99 months down to a 30-month sentence on various  
2 grounds, which sentence was affirmed by the Ninth Circuit.

3 **II. EVIDENTIARY HEARING AT SENTENCING**

4 CONTE has requested an evidentiary hearing at time of  
5 sentencing with respect to his Motion for Downward Departure.  
6 CONTE will call as a witness DR. GUERNSEY and may call other  
7 witnesses.

8 **III. CRIMINAL HISTORY CATEGORY**

9 The probation officer calculated a Criminal History Category  
10 of III; the Government objected and added 1 point, which also  
11 resulted in a III. The Defendant's position is the Criminal  
12 History Category is II. See Charts, EXHIBITS 1 and 2, attached.

13 **IV. GUIDELINE CALCULATION**

14 CONTE asks for departure of at least 10 levels for a Guideline  
15 range of 4-10 months, Zone B, and halfway house/work release. If  
16 the court agrees with CONTE and finds no additional 2 points for  
17 position of trust, CONTE'S offense level is 18:  $6 + 13 + 2 - 3 =$   
18 18. Offense level of 18 and Criminal History Category of II yields  
19 30-37 months, Zone D. With a downward departure of 10, an offense  
20 level of 8 and a Criminal History Category of II yields 4-10  
21 months, Zone B. If the Government prevails on the position of  
22 trust and the court finds Criminal History Category II and departs  
23 downward 10 levels, this yields 8-14 months, Zone C.

24 **V. GUIDELINE EDITION**

25 As stated in the overview, the Guidelines were amended on  
26 November 1, 1998, including an amendment with respect to §5K2.13

1 and diminished capacity. Also relevant to CONTE'S request for  
2 downward departure is amendment number 508 with respect to §5K2.0,  
3 which embodies the decision of Koon v. U.S., 116 S.Ct. 2035 (1996).  
4 As the Commission states,

5 The purpose of this amendment is to reference  
6 specifically in the general departure policy  
7 statement the United States Supreme Court's  
8 decision in [Koon]. This amendment (1)  
9 incorporates the principle holding the key  
10 analytical points from the Koon decision into  
11 the general departure policy statement,  
12 §5K2.0; (2) deletes language inconsistent with  
13 the holding of Koon; and (3) makes minor, non-  
14 substantive changes that improve the precision  
15 of the language of §5K2.0.

16 VI. THE GREEN DECISION/POST-OFFENSE REHABILITATION

17 It is clear that in the Ninth Circuit, post-offense  
18 rehabilitation is a proper ground for downward departure. See the  
19 1998 Green decision, discussed, infra.

20 VII. THE McBROOM DECISION/DIMINISHED CAPACITY

21 McBroom was a lawyer who plead guilty to one count of  
22 possession of child pornography, which pornography McBroom  
23 downloaded on his computer from the Internet. "Finding that  
24 McBroom was able, at the time of the offense, to absorb information  
25 in the usual way and to exercise the power of reason, the district  
26 court concluded that McBroom was ineligible for a downward  
27 departure." Id. In vacating McBroom's sentence and remanding for  
28 resentencing, the Third Circuit stated:

29 We believe that the district court could have  
30 considered the possibility that McBroom  
31 suffered from a volitional impairment which  
32 prevented him from controlling his behavior or  
33 conforming it to the law. (Emphasis  
34 supplied.)

1       At sentencing, McBroom presented, by his uncontradicted  
2 affidavit, the sordid details of his past, which included, inter  
3 alia, sexual abuse by his father until McBroom was 15 years old,  
4 alcoholism, cocaine use, acute alcohol-induced pancreatitis,  
5 addiction to pornography, including peep show visits and the  
6 "wealth of pornography available on the Internet," including child  
7 "pornography, bestiality, masochism, bondage, and every imaginable  
8 sexual fetish." Id. at 533-536. In support of his motion for  
9 downward departure, McBroom submitted letters from three medical  
10 professionals and in his motion for reconsideration submitted two  
11 supplemental reports. In substance, the doctors diagnosed McBroom  
12 as having "Cyclothymic Disorder, a bi-polar mood disorder and  
13 impulse control disorder." In fact, the district court found "that  
14 McBroom suffered from bi-polar disorder, manic depression, and  
15 multiple disorders of impulse control," but because the court found  
16 that McBroom was able to exercise the power of reason, the court  
17 held that McBroom was not suffering from a significantly reduced  
18 mental capacity under §52K.13, the court relying on U.S. v.  
19 Johnson, 979 F.2d 396, 401 (6th Cir. 1992).

20       The Third Circuit reversed for reasons now adopted by the  
21 Guidelines: "significantly reduced mental capacity" contains a  
22 volitional component, meaning that the court should focus on the  
23 element of control. Id. at 544, 545. Quoting from the Seventh  
24 Circuit, U.S. v. Poff, 89 F.3d 368, 370-71 (7th Cir. 1996), the  
25 McBroom court found:

26               ... Likewise, if an individual is capable of  
27 appreciating the nature, quality, and

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wrongfulness of certain acts, but is unable to control the conduct due to reduced mental capacity, §5K2.13 may also apply. Thus, §5K2.13 retains both a "cognitive prong" and a volitional prong."

In the words of the Seventh Circuit, in Poff, "a person who knows what he is doing and that it is wrong but cannot control himself is deficient in mental capacity." Id. at 545. In other words, "our system of criminal justice punishes criminals not because of the act alone, but because of the offender's failure to exercise his capacity to control his behavior in conformity with the demands of society." McBroom at 546.

Justice demands that sentencing courts be able to consider an offender's capacity to control his behavior before determining an appropriate sentence. §5K2.13 provides courts with the ability to do just that. *Id.*

The McBroom court then went on to discuss the disparity between the circuits. Compare U.S. v. Hamilton, 549 F.2d 190 (6th Cir. 1991) (per curiam) (gambling disorder; no diminished capacity because defendant able to absorb information and exercise power of reason); U.S. v. Goossens, 84 F.3d 697, 701 (4th Cir. 1996) (anxiety disorder and psychological problems; but defendant was a man of "above average intellectual capacity" possessed a "high level of mental functioning" and "was employed in a responsible position;" no downward departure because defendant above average cognitive function); U.S. v. Withers, 100 F.3d 1142, 1148 (4th Cir. 1996) (depression; no downward departure because defendant able to process information and reason; U.S. v. Edwards, 98 F.3d 1364, 1367 (D.C. Cir. 1996) (no downward departure because defendant able to

1 reason); U.S. v. Barajas-Nunez, 91 F.3d 826, 831 (6th Cir. 1996)  
 2 (the condition must affect ability to process information or to  
 3 reason to qualify as diminished capacity); U.S. v. Johnson, 979  
 4 F.2d 396, 401 (6th Cir. 1992) (defendant able to process  
 5 information and to reason; no downward departure; defendant  
 6 possessed "considerable mental agility in his professional and  
 7 personal affairs") with U.S. v. Chatman, 986 F.2d 1446 (D.C. Cir.  
 8 1993) (defendant with significantly reduced mental capacity which  
 9 contributed to the commission of the crime should be treated with  
 10 lenity); U.S. v. Cantu, 12 F.3d 1506 (9th Cir. 1993) (lenity  
 11 appropriate); U.S. v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994)  
 12 (lenity for those who cannot control their actions). The circuit  
 13 disparity has been put to rest by the 1998 amendment, whereby the  
 14 Commission has expressly adopted the McBroom holding and reasoning.  
 15

16 Moreover, there is no "but for" rule applied to diminished  
 17 capacity under §5K2.13. The defendant's "significantly reduced  
 18 mental capacity" must be a contributing cause of the offense but  
 19 need not be the sole cause. See U.S. v. Soliman, 954 F.2d 1012,  
 20 1014 (5th Cir. 1992) (depression; child pornography; disorder not  
 21 causally linked to the offense); U.S. v. Glick, 946 F.2d 335, 339  
 22 (4th Cir. 1991) (stress disorder; transportation of stolen  
 23 property; downward departure from level 18 to probation); U.S. v.  
 24 Ruklick, 919 F.2d 95, 97-98 (8th Cir. 1990) (distribution of LSD;  
 25 remanded, holding that mental illness need not be the "but for"  
 cause of the offense).

26 The Ninth Circuit in Cantu recognized that §5K2.13 applies to  
 27

1 both mental defects and emotional disorders, treating emotional  
 2 illnesses in the same way that we do mental abnormalities furthers  
 3 the purpose of S5K2.13." Id. at 1512. Finally, this is not a case  
 4 where the court should be concerned about creating an incentive for  
 5 defendants like CONTE "to comb their personal circumstances in  
 6 order to find evidence of hardship or misfortune." Withers at  
 7 1148. Here, CONTE was diagnosed with his bi-polar condition circa  
 8 1991, several years prior to the subject offense conduct.

9 **VIII. FACTUAL BACKGROUND<sup>1</sup>**

10 See declarations of CONTE and his wife, Lori, for personal  
 11 factual background information, Exhibits 3 and 4, respectively.  
 12 The offense conduct description contained in the PSR makes it sound  
 13 as if CONTE ab initio, developed the scheme, when in fact it was a  
 14 scheme devised by LYNN BOGART and CARMEN LUCCI. Moreover, the  
 15 description of CONTE'S conduct makes it appear as if MURDOCK  
 16 reasonably relied on CONTE, when in truth, MURDOCK had a chief  
 17 financial officer, HUGO BOREN, who was involved in the discussions,  
 18 and in fact, advised MURDOCK against the subject investment.  
 19 According to CONTE, BOREN indicated that he thought it sounded like  
 20 a good idea but did not know much about the business; thus, he was  
 21 against the investment and told MURDOCK as such. MURDOCK, rather  
 22 than relying on his long-time trusted financial officer, relied on  
 23 CONTE, who, as known to MURDOCK, was a convicted felon, convicted  
 24 of defrauding others.

25  
 26  
 27 <sup>1</sup> Some of this background information is contained also  
 in CONTE'S Objection to the PSR.

In fact, CONTE met BOGART and LUCCI for the first time when MURDOCK met them in Utah in 1993. Attending that meeting was HUGO BOREN. At that meeting, or soon after, BOREN expressed to MURDOCK and CONTE his suspicions concerning the investment because he believed that LUCCI was dressed like and acted like a mobster; LUCCI wore a full-length mink coat. This was not a situation of MURDOCK relying merely on CONTE; rather, MURDOCK, in his typical style as owner of NATURE'S WAY, talked to not only CONTE, but to BOREN and others for advice as to what he should do. {NATURE'S WAY, CONTE believes, is the world's largest manufacturer of vitamins and other supplements.} Thus, statements such as "more persuasion by RUSSELL," PSR pg. 3, line 32, is at best misleading because MURDOCK continued to rely not only on CONTE, but on others.

It was not until MURDOCK had paid \$1,280,000 net to BOGART (200 + 650 - 22 + 650 = 1,280) that CONTE became aware of the fraudulent scheme perpetrated on MURDOCK and CONTE by BOGART and LUCCI. See plea agreement, pg. 8, para. 4. Before that time, both CONTE and MURDOCK went to San Diego to check out BOGART'S business practices, and BOGART defrauded both CONTE and MURDOCK by showing storage containers with boxes of paper which BOGART claimed evidenced that the investment was valid and solid.

CONTE and MURDOCK were very close friends, which friendship began circa 1992. MURDOCK was undergoing marital problems and in fact was separated from his wife and lived in a condo and kept begging CONTE to live in the condo with him. CONTE and MURDOCK would spend considerable time together, including not only working

1 out, but going to basketball games and restaurants. MURDOCK was  
2 very much taken back when CONTE, who was already married, did not  
3 have the time to spend with MURDOCK and would not leave his wife  
4 and children to live with MURDOCK. In fact, CONTE and his family  
5 moved to Arizona for purpose of getting away from MURDOCK, given  
6 MURDOCK'S overbearing, controlling, and manipulative personality.  
7 MURDOCK'S claim that CONTE "was the key to the entire fraud," PSR  
8 page 4, line 36, is belied by the probation officer's recognition  
9 that but for BOGART and the scheme devised ab initio by BOGART,  
10 there would have been no involvement by CONTE in this MURDOCK  
11 fraud.

12 Of the approximately \$616,000 proceeds received by CONTE,  
13 \$250,000 of that was loaned by CONTE to BOB JONES, president and  
14 major stockholder of Commonwealth Thrift, an FDIC thrift, and  
15 secured by stock in that bank. Circa early 1995, CONTE told  
16 MURDOCK that when the note came due at the end of September, 1995,  
17 CONTE would give the proceeds to MURDOCK or if JONES could not pay  
18 the note off, CONTE would assign the note to MURDOCK. MURDOCK  
19 instructed CONTE to have JONES sign the note with MURDOCK'S  
20 company, MI, LC, which was done in November of 1995. Commonwealth  
21 was to provide a credit card program designed specifically for sub-  
22 prime borrowers. However, some time in the middle of 1996,  
23 Commonwealth was taken over by the FDIC regulators due to liquidity  
24 problems. In effort to held MURDOCK get his money back, CONTE  
25 placed phone calls two or three times a week for four years for  
26 follow-up, updates and brainstorming, which should demonstrate  
27

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CONTE'S post-offense rehabilitation gain, most significantly: CONTE paid MURDOCK back \$220,000 in cash and assigned MURDOCK the Jones note for \$250,000.

## IX. DOWNWARD DEPARTURE LEGAL ANALYSIS

A. Generally

CONTE presents a number of grounds for downward departure in this case. Some of the cases are pre-Koon, many are post-Koon. In any event, it is obvious that by the U.S. Supreme Court's decision in Koon, and the 1998 Guideline amendments, district courts are given wide latitude with respect to exercising their discretion in granting downward departures on a single ground or even under a cumulative factor test: factors in combination. CONTE has attempted to list the factors for downward departure in an order which he feels appropriate: the most important first.

CONTE recognizes that there might be presented issues which overlap, especially where issues are identified by selected Guideline "buzz words." For example, "cumulative factors (singly and in combination)" is probably really no different than "combination of individual characteristics," which is the same as "other extenuating and mitigating circumstances," which differs little from "fair and reasonable sentence." These Guideline characterizations come from, of course, two sources: the Guidelines and the cases. CONTE does not wish to belabor any points; he merely wants to insure that she "covers all of the bases."

1                   B. Post Conduct Rehabilitation, §5K2.0. This court should  
 2 consider post conduct rehabilitation. See, e.g., U.S. v. McBroom,  
 3 991 F.Supp. 445 (D. NY 1998) (on remand district court departed  
 4 downward one level for diminished capacity and two levels for post-  
 5 offense rehabilitation); U.S. v. Brock, 108 F.3d 31, 33-35 (4th  
 6 Cir. 1997) (post-Koon decision; post offense efforts at  
 7 rehabilitation may serve as a basis for downward departure); U.S.  
 8 v. Sally, 116 F.3d 76, 79-82 (3rd Cir. 1997) (Id.).

9                   In addition, CONTE is entitled to a downward departure for  
 10 post-offense rehabilitation/super acceptance of responsibility.  
 11 After the offense and prior to notice of a criminal investigation,  
 12 CONTE caused MURDOCK to recover a substantial amount of his fraud  
 13 loss: \$220,000 in cash recovered. CONTE also assigned to MURDOCK  
 14 a note which CONTE believed was worth \$250,000, secured by stock in  
 15 a company but proven to be worthless, plus CONTE gave MURDOCK a  
 16 note for the balance owed, plus interest, approximate total amount  
 17 of \$2.5 million plus interest. Downward departures for both post-  
 18 offense and post-sentence rehabilitation are permitted by the Ninth  
 19 Circuit. See, e.g., U.S. v. Green, 152 F.2d 1202, 1206-08 (9th  
 20 Cir. 1998) (post-sentence rehabilitation downward departure  
 21 affirmed; court recognizes, at 1206, "no difference between post-  
 22 offense rehabilitation and post-sentencing rehabilitation").

23                   CONTE claims the following early restitution/rehabilitation/  
 24 remorse/etc. factual basis:

25                   a. July, 1994. CONTE paid MURDOCK \$100,000;  
 26                   b. August, 1995. CONTE paid MURDOCK \$120,000, signed

an agreement to pay all monies back, and assigned a note to MURDOCK in the amount of \$250,000, secured by corporate shares and Commonwealth Thrift, a California corporation.

c. February, 1998. Indictment. Thus, July, 1994 and August, 1995 are 43 and 30 months, respectively, prior to indictment.

See also U.S. v. McBroom, 991 F.Supp. 445 (D.N.Y. 1998) (on remand district court departed downward one level for diminished capacity and two levels for post-offense rehabilitation).

CONTE also raises additional grounds for departure. For example, the court should take into consideration downward departure based on the fact that CONTE was not aware of the grand scheme of BOGART and LUCCI when CONTE initially advised MURDOCK. What CONTE did was fail to disclose to MURDOCK the fact that CONTE was to receive a 10% commission on all monies paid over to BOGART and LUCCI. CONTE did not know, ab initio that BOGART and LUCCI were perpetrating a fraud upon MURDOCK. In other words, CONTE was suckered into the scheme, no less than MURDOCK. See, e.g., Plea  
Agreement at page 8, para. r:

After Murdock made the \$650,000 investment, defendant found out that the whole investment scheme was a fraud. Instead of telling Murdock, he demanded that Bogart make him a 50% partner in the proceeds of all future investments by Murdock. (Emphasis supplied.)

By this time, which was after MURDOCK had paid \$1,280,000 net to BOGART:  $200 + 650 - 220 + 650 = 1,280$ . That post-Koon<sup>2</sup> the

<sup>2</sup> Koon v. U.S., 116 S.Ct. 2035 (1996).

1 Ninth Circuit gives wide latitude to the district court in making  
2 a downward departure determination is best evidenced by the very  
3 recent case of U.S. v. Sanchez-Rodriguez, \_\_ F.3d \_\_, 1998 W.L.  
4 81855 (9th Cir. 1998) (en banc). In Sanchez-Rodriguez, decided  
5 November 20, 1998, the district court departed from a range of 77 -  
6 99 months down to a 30-month sentence on grounds that: (1) the  
7 amount of drugs was small; (2) delay in charging and sentence; and  
8 (3) waiver of deportation hearing. The government agreed only as  
9 to (3) and appealed on (1) and (2), but the sentence was affirmed  
10 by the Ninth Circuit.

1 impairments (i.e., the inability to control behavior that the  
 2 person knows is wrongful.) The application note specifically  
 3 includes both types of impairments in the definition of  
 4 "significantly reduced mental capacity."

5 The case of U.S. v. Mary Ann Herbert, 902 F.Supp. 827  
 6 (N.D. Ill. 1995) is instructive. Herbert plead guilty to  
 7 embezzlement and tax fraud. In order to "salvage her failing  
 8 company," she started gambling. Winnings did not cover the debts.  
 9 Herbert embezzled \$70,000 from a pension fund. Herbert's  
 10 psychiatrist concluded that Herbert suffers "an ongoing psychiatric  
 11 illness ... [and] displays a number of features which are often  
 12 seen in individuals with mixed personality states that include  
 13 narcissistic, histrionic and borderline features." The  
 14 psychiatrist further explained that Herbert's illness "causes a  
 15 depressed state prompting Herbert to question her own worth, make  
 16 poor decisions, and then offer excuses to compensate for her  
 17 shortcomings." The court ordered a second psychiatric evaluation  
 18 to determine whether Herbert's psychological difficulties  
 19 contributed to her criminal actions. The court found that Herbert  
 20 had, in fact, been impaired at the time of the offense. The  
 21 psychiatrist stated:

22 In my opinion, Ms. Herbert suffered  
 23 cognitive difficulties (poor concept formation  
 24 and poor ability to understand or judge  
 25 situations) and emotionally driven decision  
 26 making. Her behaviors and thought patterns  
 27 were influenced by her impaired mental  
 condition which include a severe depressive  
 disorder compounded by a pathological gambling  
 disorder and alcohol dependence. The  
 consequences of her personality disorder which

1 included her feelings of inadequacy (which  
 2 impacted upon her ability to lead or  
 3 administer a corporation) resulted in  
 4 extremely poor decision-making which  
 consequently led to the charge against her.  
 Her inability to cope with the sequence of  
 events resulted in her suicide attempt.

5 Ms. Herbert's mental state at the time of  
 6 the offense was extremely impaired. As a  
 7 direct result of an active depressive illness  
 compounded by her mix personality state, her  
 8 perception of her faults and weaknesses, in  
 addition to her limited coping capacity and  
 9 poor judgment subsequently resulted in a  
 reduced mental capacity during the period of  
 10 time immediately preceding, during, and after  
 the offense.

11 Relying upon U.S. v. Lewinson, 988 F.2d 1005 (9th Cir. 1993)  
 12 and U.S. v. Frazier, 979 F.2d 1227 (7th Cir. 1992), the district  
 13 court granted Herbert's request for a downward departure, and  
 14 although Herbert's total offense level was 13, she was placed on  
 15 probation for a term of 42 months and placed on home confinement  
 16 for the first six months of probation.<sup>3</sup> In granting Herbert a  
 17 downward departure, the court stated:

18 In sum, all that Frazier and Section 5K2.13  
 19 require is that (1) the defendant suffered a  
 diminished mental capacity at the time of the  
 20 offense, and (2) the mental impairment  
 contributed to the commission of the crime.

21 See also, U.S. v. Speight, 726 F.Supp. 861, 867-869 (D.D.C.  
 22 1989) (in determining whether departure was warranted, the fact  
 23 that defendant's mental illness and drug addiction might both have  
 24 contributed to commission of offense did not bar application of

---

25  
 26 <sup>3</sup> The reported case does not state the number of levels  
 27 departed. However, a review of the judgment indicates the  
 Guideline calculation before departure and reveals the  
 sentence of probation/home confinement.

1 mental illness downward departure; defendant's two prior narcotics  
 2 offenses did not establish need for incarceration of defendant to  
 3 protect public); U.S. v. McMurray, 833 F.Supp. 1454, 1480-85  
 4 (D.Neb. 1993) (bi-polar; diminished capacity warranted downward  
 5 departure) (the subsequent case history does not concern the  
 6 issue); U.S. v. Ruklick, 919 F.2d 95, 97 (8th Cir. 1990)  
 7 (distribution of LSD; remanded, holding that mental illness need  
 8 not be the "but for" cause of the offense). In McMurray at 1480-  
 9 81, we find this discussion of the bi-polar disorder:

10 A "bi-polar disorder" is characterized by  
 11 manic episodes. [Reference to Diagnostic and  
 12 Statistical Manual Mental Disorders (3rd Ed.  
 13 revised) (DSM-III-R) at 214] These manic  
 14 episodes are characterized by elevated,  
 15 expansive or irritable moods and "are  
 16 sufficiently severe to cause marked impairment  
 17 in occupational functioning or in usual social  
 18 activities or relationships with others, or to  
 19 require hospitalization to prevent harm to  
 20 self or others." (Id.) The "elevated mood  
 21 may be described as euphoric, unusually good,  
 22 cheerful or high, often having an infectious  
 23 quality for the uninvolved observer, but  
 24 recognized as excessive by those who know the  
 25 person well." (Id. at 215.) The "elevated  
 26 mood" may also turn angry: "another common  
 27 associated feature is lability of mood, with  
 28 rapid shifts to anger or depression." (Id. at  
 29 216.) "Frequently the person does not  
 30 recognize that he or she is ill and resists  
 31 all efforts" at treatment. (Id.)

32 These episodes begin suddenly, and last from a  
 33 few days to months. (Id.) There is often a  
 34 need for involuntary hospitalization because  
 35 of the poor judgment exhibited by the person  
 36 during these periods of time. (Id.) The  
 37 "most common complications of a Manic Episode  
 38 are Psychoactive Substance Abuse and the  
 39 consequences of actions resulting from  
 40 impaired judgments, such as financial losses  
 41 and illegal activities." (Id.)

1       The Ninth Circuit case of Cantu, supra, contains a detailed  
 2 analysis of the Ninth Circuit's view of diminished capacity with  
 3 respect to a Vietnam veteran who had post-traumatic stress syndrome  
 4 disorder. At 1512 we find this:

5       "Reduced mental capacity," then, comprehends  
 6 both organic dysfunction and behavioral  
 7 disturbances that impair the formation of  
 8 reason judgments. Both make a defendant  
 9 eligible for departure under §5K2.13.  
 10 Therefore, a defendant suffering from post-  
 11 traumatic stress disorder, an emotional  
 12 illness, is eligible for such a departure if  
 13 his ailment distorted his reasoning and  
 14 interfered with his ability to make  
 15 considerate decisions.

16       Moreover, the Ninth Circuit's liberal view of §5K2.13 is  
 17 demonstrated by its footnote 5 in Cantu at 512, in which the court  
 18 recognizes that to qualify for diminished capacity downward  
 19 departure, there is no requirement "that the defendant's condition  
 20 appeared, as Cantu's does, in the American Psychiatric  
 21 Association's Diagnostic and Statistical Manual of mental  
 22 disorders, or even that the defendant suffered from a recognized  
 23 mental or emotional disease." See also, 128 A.L.R. Fed. 593 (1995)  
 24 - "Permitting Downward Departure for Defendants with Significantly  
 25 Reduced Mental Capacity of Non-violent Offenses," especially §5,  
 26 "Manic/depression;" U.S. v. Christensen, 18 F.3d 822 (9th Cir.  
 27 1994) (district court incorrectly concluded that it was without  
 28 authority to consider whether defendant's bi-polar disorder might  
 warrant a downward departure; downward departure would be based on  
 other than §5K2.13 because defendant convicted of crime of  
 violence). Compare, U.S. v. Eagan, 965 F.2d 887 (10th Cir. 1992)

1 (denial of downward departure affirmed; court determined defendant  
 2 fully understood what he was doing; court not applying McBroon  
 3 test); U.S. v. Moore Bey, 981 F.Supp. 688 (D.D.C. 1997) affirmed  
 4 1998 WL 38, 8506 D.C. Cir. 1998 (defendant not entitled to downward  
 5 departure despite some history of bi-polar disorder; offenses  
 6 violent; long history of drug abuse); U.S. v. Frazier, 979 F.2d  
 7 1227 (7th Cir. 1992) (downward departure from 17 to 6 under  
 8 S5K2.13; reversed; defendant failed to establish a nexus between  
 9 diminished capacity and her offense; defendant must show causal  
 10 relationship; dysthymic<sup>4</sup> disorder; no showing that reduced mental  
 11 capacity contributed to the commission of the offense; such a link  
 12 cannot be assumed).

13       D.    Fraud Loss Overstated as to CONTE.   What we have here is  
 14 really three schemes to defraud: (1) BOGART'S scheme to defraud  
 15 MURDOCK and CONTE ab initio (\$2.7 million); (2) CONTE'S scheme to  
 16 defraud MURDOCK with respect to CONTE'S 10% of what MURDOCK would  
 17 pay BOGART \$128,000 (10% of \$1.28 million); (3) BOGART and CONTE'S  
 18 scheme for continuation of defrauding MURDOCK \$1.42 million (\$2.7  
 19 million - \$1.28 million).   Under the plea agreement, the parties  
 20 agree that the fraud loss is in excess of \$2.5 million (\$2.7  
 21 million). (pg. 13)   The agreement also permits CONTE to argue for  
 22 downward departure on any ground. (pg. 14)   Thus, his downward  
 23

24       <sup>4</sup> Dysthymia is defined as "a mood disorder characterized by  
 25 depressed feeling (sad, blue, low, down in the dumps) and  
 26 loss of interest or pleasure in one's usual activities and  
 27 in which the associated symptoms have persisted for more  
 than two years but are not severe enough to meet the  
 criteria for major depression." Frazier at 1230, quoting  
 from medical dictionary.

1      departure argument is simply this: the fraud loss is overstated  
 2      with respect to CONTE under the following calculation.

3      The total net fraud loss to MURDOCK was \$2.7 million. Of  
 4      this, MURDOCK lost \$1.28 million to BOGART without CONTE knowing  
 5      that BOGART was engaged in a fraudulent scheme. The only MURDOCK  
 6      loss at this time foreseeable to CONTE, and the only actual MURDOCK  
 7      loss with respect to CONTE, was 10% of the \$1.28 million, or  
 8      \$128,000. Thus, the loss attributable to CONTE under CONTE'S  
 9      downward departure analysis is: \$1.48 million = 2.7 - 1.28 + .128  
 10     (the 10%). Put another way, the fraud loss with respect to CONTE  
 11    is overstated/over represented. Under the fraud table, \$2F1.1, a  
 12    loss of more than \$1.5 million yields an additional 12 points,  
 13    whereas, more than \$5 million yields an additional 14 points, for  
 14    a difference of 2 points. A downward departure of at least 2  
 15    points on this issue is warranted.

16      E. Extent of DEFENDANT'S remorse. See, e.g., U.S. v.  
 17      Jaroszenko, 92 F.3d 486 (7th Cir. 1996).

18      F. Extraordinary acceptance of responsibility. See e.g.,  
 19      U.S. v. Rogers, 972 F.3d 489, 493 (2nd Cir. 1992) (defendant turned  
 20     himself in the day after committing the bank robbery); U.S. v.  
 21      Brown, 985 F.2d 478, 482-83 (9th Cir. 1993) (same); U.S. v.  
 22      Lieberman, 971 F.2d 989, 996 (3rd Cir. 1992) (defendant paid more  
 23     in restitution than he actually owed, resigned from position at  
 24     bank, explained how to detect improper transactions in the future);  
 25      U.S. v. Miller, 991 F.2d 552, 553-54 (9th Cir. 1993) (remand to  
 26     determine if extraordinary restitution justified departure).

The same facts that apply to CONTE'S post-conduct rehabilitation apply to this factor. See, e.g., U.S. v. Evans, 49 F.3d 109, 112-115 (3rd Cir. 1995) (remanding for resentencing; relying, in part, on amendment to U.S.S.G. §5K2.0 Commentary). In Evans, the Third Circuit, citing Gaskill, infra, held that a downward departure might be appropriate based on extraordinary acceptance of responsibility where defendant revealed his true identity to probation officer, which otherwise would have remained undiscovered.

G. Cumulative factors (singly and in combination), S5K2.0.  
(Old Amendment 508.) See, e.g., U.S. v. Mena, 968 F.Supp. 115 (E.D. NY 1997) (downward departure of 15 levels based on a number of factors singly and in combination, including S5K2.12 coercion and duress because defendant was dominated, manipulated and pressured by his older brother). The Commission in its commentary to the amendment noted that it was not foreclosing the possibility "in an extraordinary case, that a departure could be based upon a combination of individual offending characteristics." 59 Fed. Reg. 23608, 23610 (May 5, 1994). See, e.g., U.S. v. Cook, 938 F.2d 149, 152-53 (9th Cir. 1991) (court stated that where individual factors would not justify departure, a combination of those same factors may constitute mitigating circumstances justifying a departure).

H. Koon departure review standards. Under the 1998 amendments, we find an amendment to §5K2.0: "This amendment (A) incorporates into the general departure policy statement the

principle holding and key analytical points of the United States Supreme Court's decision in Koon v. U.S., 518 U.S. 81 (1996); (B) removes the language that is inconsistent with the Koon holding; and (C) generally enhances the precision of the language of the policy statement."

I. Other extenuating and mitigating circumstances. See, U.S. v. Brennick, 949 F.Supp. 32 (D. Mass. 1996) in which the district court held that defendant's conduct in initially paying his withholding taxes late before he stopped paying them at all, financial conditions in the industry which contribute to the failure of the defendant's business, and the fact that the applicable Guideline overstated the seriousness of the offense, all justified a downward departure.

J. Fair and reasonable sentence. See, e.g., U.S. v. Gaskill, 991 F.2d 82, 86 (3rd Cir. 1993) (court stated that "district judges need not shrink, however, from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence.")

## X. SUMMARY AND CONCLUSION

CONTE'S post-offense rehabilitation/remorse/restitution, all made prior to notice to him of any criminal investigation, warrants downward departure.

This is an unusual case of an intelligent, educated individual who suffers from a bi-polar condition. At the evidentiary hearing, through the testimony of DR. GUERNSEY who treated CONTE and

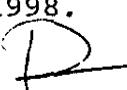
1 diagnosed CONTE well in advance of the subject offense, CONTE will  
2 demonstrate to the court that he satisfied the test under S5K2.13  
3 for downward departure for diminished capacity.

4 CONTE submits additional factors for this court's  
5 consideration in awarding downward departure. In sum, CONTE  
6 requests at least a 10-level downward departure and a sentence in  
7 Zone B, affording CONTE a sentence to a halfway house with work  
8 release and continued treatment for his bi-polar condition.

9 EXHIBITS ATTACHED

10 1 Guideline Calculations  
11 2 Criminal History Calculation  
12 3 Declaration of Russ Conte  
13 4 Declaration of Lori Conte

14 DATED this 3 day of December, 1998.

15   
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29 Copy of the foregoing mailed  
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**CONTE GUIDELINE CALCULATIONS**  
**(Before Any Downward Departure)**

	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
Base Offense	6	6	6
Fraud Loss	+13	+13	+13
More than minimal planning	+ 2	+ 2	+ 2
Position of trust	+ 2 ---	+ 2 ---	0 ---
Adjusted Offense Level	23	23	21
Acceptance of Responsibility	- 3 ---	- 3 ---	- 3 ---
Total Offense Level	20	20	18
Criminal History Score <sup>1</sup>	5	6	3
Criminal History Category	III	III	II
GL Range (months)	41-51	41-51	30-37

Exhibit 1

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<sup>1</sup> See Exhibit 2 for calculation.

## CONTE CRIMINAL HISTORY CALCULATION

	<u>§4A1.1</u>	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
(c) Utah Federal Conviction (less than 60 days imprisonment)		2	2	1
(c) Utah State Conviction (vacated)		1	1	0
(d) Offense Committed While on Probation		2	2	2
(e) Offense Committed Within 2 Years of Prior Offense	0 ---	1 ---	0 ---	
Total	5	6	3	

CONTE'S §4A1.1 analysis: The Utah federal conviction resulted in a "sentence of imprisonment" of about 45 days, less than 60 days, thus (c), not (b) applies. The Utah state conviction was vacated, and thus, does not apply. There is no application of (e) because there is no (a) or (b).

Exhibit 2

DECLARATION BY RUSS CONTE

The late part of 90 I started having serious panic attacks coupled with night sweats that left me waking up in a pool of sweat. I would have serious bouts of depression where I would not get out of bed for days, to going non stop in a million different directions, all in a sense of urgency, but none of which made any sense or reason. We went to our family doctor, Dr. Morrison, who then referred me to a psychiatrist that he knew who was a specialist in this area.

Up to this point, I had never been to a Psychiatrist and was quite surprised that our doctor felt I needed one, it left me wondering, what in the world a psychiatrist could do to help me with these attacks I was having. Up to this point when I was in bed I just thought I was coming down with something and feeling the pressures of daily business, thinking that the stress was just getting to me but when the illness never came and mania set in after the depression I would do stupid things feeling like I was invincible and that I could do no wrong, not thinking of the consequences of my actions. I knew something was wrong (at the time I owned several businesses that many of my friends and relatives had invested in, e.g., trucking company, sand and gravel construction company, finance company, bail bond company, an employment agency, a collection agency, used car sales company). My businesses started to fail due to my lack of presence and inability to make logical intelligent decisions because of my illness. Interest payments that I had been paying to my investors monthly became harder and harder to make which up to this point I

prided myself on the fact that I had not been late on any of my payments for over a year and in some cases two years.

An example, of my illogical thinking was instead of making logical and good business decisions, when I knew I could no longer continue on this path, I obtained five or so credit cards totaling \$26,000 using a fraudulent social security number and alias, using the money to pay, never considering the consequences of using a false name and how I was going to make the next months payments.

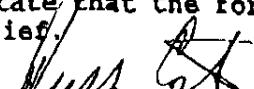
The federal government charged me with false financial statement to a federally insured institution, false social security number and defeating and evading taxes. It seems that all of the agencies that were present in my meeting with them wanted a piece of me.

After several meeting and test with Dr. Guernsey, he diagnosed me with Bi-Polar manic depression. I believe this was the beginning of 91. I met with Dr. Guernsey on a weekly basis for about a year and a half trying a myriad of different medications, i.e., antidepressants, anti-mania, etc. but had little success. Dr. Guernsey suggested after a year of different meds. that I have ECT. Not wanting to go to this extreme I continued trying the different meds. Dr. Guernsey was sent to the Gulf War [Army Reserve] and referred me to Dr. Hurst who was continuing the therapy and med treatment. He also was recommending ECT. The therapy was helpful for Lori and me to deal with the illness and understand the many intricacies of the illness. After trying all we could with the meds, we decided to try the ECT.

Although being a M.D. Psychiatrist, Dr. Hurst was not qualified to perform ECT and referred me to Dr. Segal who had an excellent reputation as being a good psychiatrist and bi-polar manic depression and qualified to perform ECT. Dr. Segal tried therapy and meds to make sure they did not work before he tried ECT but met with the same failure as we had had with the other doctors. Sometime in the beginning of 92 (?) I had ECT. I was an inpatient at the hospital for a week where I underwent three treatments of shock treatment. I was released and had six more treatments as an out patient for a total of about ten treatments in all.

I continued the therapy and meds under Dr. Segal for several months after. When Dr. Guernsey returned from the Gulf War I stopped seeing Dr. Segal and began seeing Dr. Guernsey (I was seeing Dr. Segal on a weekly basis). Dr. Guernsey continued the meds and therapy helping me through the difficult time of going through the system. Dr. Guernsey saw me on a weekly basis while I was in prison and continued to prescribe the meds. Dr. Guernsey continued to see me every two weeks until I left for Arizona. In Arizona Dr. Williams has been seeing me since trying different and the latest drugs for my illness. I am still considering further ECT treatments.

UNDER PENALTIES OF PERJURY I state that the foregoing is true to the best of my knowledge and belief.

  
Russ Conte

Dated: 12-3-98

rr:conteh.aff

DECLARATION OF LORI CONTE

Russ and I met in 1982 while we were both attending Brigham Young University. We dated for one year then married in 1983. Our first child was born a beautiful girl. Russ had a small collection business while he was in school this is how he supported us. Our second child, a son, was born two years later. While I was pregnant, I went back to school to get a nursing degree. Three years later our third child, a daughter, was born. We were a very happy small family.

Russ continued his collection company which expanded into several other businesses. Russ continued to do more and more, juggling all his affairs with unusual energy and stamina. Then one day he seemed to have lost that energy all at once. He would not get out of bed. It was so scary to see my husband, all 220 pounds, curled up in bed afraid to get up. Afraid to face anyone or anything. After two weeks of his staying in bed and a weight loss of twenty pounds he finally agreed to consult a physician. He went to a doctor that sent him immediately to a psychiatrist. He diagnosed Russ right off with Manic Depression, saying he had classic symptoms. As a nurse I knew very little about the illness and nine years ago there was very little information to be found. Mainly, what I learned was from my experiences and with talking to others who are close to someone with the illness.

When Russ is manic, he goes one hundred miles an hour, waking up early, going to bed late, very little sleep. He will get on a subject (it could be anything) and talk about it for hours. He spends money not thinking. There is always plenty of money when

he is manic. He also has the outlook that anything is possible, and he can do no wrong. He is always easily agitated when he is manic. We have learned to stay out of his way when he is angry.

Then, on the other side with the depression, he has a hard time being around people. He wants to be left alone. Nothing is right when he is this way. He stays in bed most of the day, then goes to bed very early. He is afraid of everything, unable to cope with even the smallest issues.

At first, the depression was the hardest for me to deal with, watching someone you love just lay there unable to help themselves is hard.

Russ had taken out an insurance policy a few months before all of this occurred in case anything should happen to him the family would be taken care of. When he got sick, I tried to keep things going but there were so many balls he had in the air, I was unable to run the businesses. The doctors later told me it was the mania that allowed him to do all he was doing and to think it would all work out. Everything just fell apart. The businesses failed. Russ continued to bounce from mania to depression.

We did receive money from the insurance but it was very sporadic, sometimes they would go months at a time without paying us. I would call and call but no one would call back. I remember one time leaving a message crying because they had not paid for months and we were so far behind in all of our bills.

Russ decided to have a series of ECT (electric shock) treatments because the medicine he tried had not worked. We had

hoped the ECT would help with the depression. And it did for a while but he had severe memory loss and during the second to last treatment the doctors were unable to stop the seizure which frightened us.

The charges against Russ in Utah are a blur to me now. It was such a hard time I think that I have blocked it out of my mind. Russ had used friends and family member's money on different investments that he had been doing but when he got sick they also lost their money. Russ beat himself up over this time and time again. Doing this made his illness all the worse. The government brought charges against him for tax evasion and using a false security number to a bank. He was to keep something afloat and in a manic mindset everything was going to workout fine. The process really took its toll after everything we had already gone through. The probation officer recommended probation but the judge went against this giving him a sentence of three months prison and three months home detention (I think). We were devastated!

Through all of our ups and downs we relied very heavily on each other to get through the hard times. So the hardest part was being separated. Russ slept twenty-three hours a day and lost a lot of weight. Sunlight and exercise have been the only two things to truly help. Both of those were taken away there.

After he got out of jail, we pulled ourselves together to get our lives back on track. Ken Murdock, an old friend, started coming over to do things with Russ. Ken never liked me. He always looked down his nose at me. He was having problems with his

marriage and wanted to do things with Russ. Ken enjoyed doing things with Russ, he was different from most men in Utah.

Ken wanted Russ to leave me and our family so Russ would always be available to do what he wanted.

Anyway, Ken was coming between us more and more. I wanted to move and get away from him. I also felt that here in Arizona the sun always shining would help Russ feel better when he was depressed.

Eric (as we knew him as) [Boggart] offered to help us get into a home here. We found a home and moved to Arizona. Ken was very upset we moved. He wanted to build a house on some property he was going to also build on.

All of the stress Russ has been under the last year has affected the depth of his depression. Dr. Williamson has wanted to do a series of ECT but with the effect, memory loss and prolonged seizure it had last time, we have chosen not to do it at this time.

Bi-Polar is a very confusing illness because the person seems so normal. The only way to truly understand it is to be around someone when they are normal and then when they are manic and depressed. My mom says it like living with an alcoholic, the family adjusting to the person who is sick.

The last point I would like to make is how hard we have worked to keep our family together. Our three children are bright, happy and well adjusted with two parents that want the very best for them. Russ is a wonderful father, very involved, caring, and loving. He is also a loving, caring husband. Russ never

intentionally hurt anyone. It has been devastating to him to know Ken lost his money and Russ has lost his friend. And that Ken would intentionally try to destroy not only Russ but his family.

Yes, there are many periods of time that Russ is completely normal. He does not realize when he is manic or depressed until he gets real bad or I point it out to him.

UNDER PENALTIES OF PERJURY I state that the foregoing is true to the best of my knowledge and belief.

Lori Conte  
Lori Conte  
Dated: December 3, 1998

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